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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	MM Docket No. 95-31
)	
)	
Reexamination of the Comparative)	
Standards for Noncommercial)	
Educational Applicants)	
)	
To: The Commission)	

Petition for Reconsideration

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Summary

The Commission's Report and Order in MM Docket 95-31, FCC 00-120 (released April 21, 2000) sets forth its determination that noncommercial broadcast construction permits should be awarded via a modified comparative hearing, i.e., a "point system". Specifically, the Commission has promulgated a set of criteria which lacks any meaningful empirical support and as such, consistent with FCC v. Bechtel, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II") and Steele v. FCC, 770 F.2d 1192 [58 RR 2d 1463] (DC Cir), *vacated*, Steele v. FCC, No. 84-1176 (DC Cir. Oct 31, 1985) (en banc), must be rejected.

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Broadcasting for the Challenged, Inc. ("BFTC"), by its attorney and pursuant to Section 1.106 of the Commission's rules and regulations, hereby respectfully submits a Petition for Reconsideration with respect to the Commission's Report and Order in MM Docket 95-31, FCC 00-120 (released April 21, 2000). In support thereof, the following is shown:

A. Background

1. In 1998, the Federal Communications Commission (hereinafter "FCC" or "Commission") issued a Further Notice of Proposed Rulemaking, Comparative Standards for Noncommercial Educational Applicants, MM Docket No. 95-31, 13 FCC Rcd 21167 (1998) ("Further Notice"). Therein, the Commission sought to resolve a number of outstanding issues pertaining to the award of noncommercial broadcast construction permits. Specifically, the Commission sought input as to whether a lottery, point system or modified comparative hearing was the best selection procedure on

channels reserved for noncommercial use.

2. On April 21, the Commission issued its Report and Order in MM Docket 95-31, FCC 00-120 (hereinafter "Report and Order"), setting forth its determination that noncommercial broadcast construction permits should be awarded via a modified comparative hearing, i.e., a "point system". For the reasons set forth hereinbelow, BFTC respectfully submits that such a conclusion is flawed and should be reversed.

B. Broadcasting for the Challenged, Inc.

3. As the Commission's records will reflect, BFTC is a public benefit corporation organized to operate exclusively for educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986. BFTC currently has pending before the Commission a Settlement Agreement which contemplates the award to BFTC of a new noncommercial permit to operate on Channel 213C2 at Abilene, Texas.¹ BFTC also currently has pending a number of FCC Form 340 applications which seek authority to construct new noncommercial FM and television stations across the country. Unfortunately, due to the processing freeze (i.e., with respect to mutually-exclusive applications) which has been in effect during the Commission's consideration

¹ BFTC had similarly filed a Settlement Agreement on June 9, 1998 whereby it was contemplated that BFTC would be awarded a new noncommercial permit to operate on Channel 211A at Midland, Texas. However, due to allotment issues which impacted the Settlement Agreement (i.e., pertaining to the USA-Mexico Agreement and its impact on a linked application at Harlingen, Texas), the parties voluntarily requested dismissal of the Settlement Agreement. As such, BFTC's Midland, Texas Agreement remains pending.

of the issues raised in the subject MM Docket 95-31, the vast majority of said mutually-exclusive applications remain in regulatory limbo pending adoption of final rules as discussed herein.

4. The moving force behind BFTC is its President, Dr. George S. Flinn, Jr. Over the past several decades, Dr. Flinn has been the exact type of broadcaster which the Commission consistently indicates that it seeks to encourage, i.e., an operator who actually builds and holds his stations. What a novel concept, particularly in an era when two parties in a market can control 70% or more of the advertising revenues and small-to-medium size broadcast groups are going the way of the dinosaurs. In addition to his purchase and technical improvement of six radio stations, Dr. Flinn has successfully obtained construction permits for, and subsequently built, three full power television stations, six radio stations and three LPTV stations (all of which he still owns). In addition, he is in the active process of building another full power television station as well as another four radio stations. As a successful bidder in Broadcast Auction #25 (and as a result of being a single applicant for several other allotments), Dr. Flinn anticipates being awarded another nine construction permits within the next two months. As with his previous stations, Dr. Flinn anticipates immediately constructing the stations in question and holding them.

5. The reason for the brief background on Dr. Flinn is threefold. First, Dr. Flinn's demonstrated willingness and ability to build (and hold) broadcast stations should go a long way toward assuaging the Commission that BFTC will not fall victim to the "build it and they will come" trap that has ensnared so many ill-conceived and financially

suspect applicants. Dr. Flinn and BFTC are quite well aware of the financial, legal and ethical burdens that public trustees of the airwaves must bear. Second, having achieved substantial financial and professional success, Dr. Flinn has entered a part of his life where philanthropic endeavors are paramount. BFTC represents an opportunity for Dr. Flinn to combine his two driving passions in life -- his love of broadcasting and his commitment to assisting disadvantaged individuals.

6. Finally, given the language of the Commission's Report and Order, it is obvious that a number of commenters have complained that groups such as BFTC have filed too many applications and must therefor be "speculating" or submitting "sham" applications. What self-serving rubbish. The fact that BFTC has a large number of applications is not its choosing. Is it BFTC's fault that there has been a processing freeze on since 1995? Is it BFTC's fault that the Commission has consistently released "A" cut-off lists which, if ignored, would have meant that BFTC would have forfeited valuable procedural rights and foreclosed forever the opportunity to broadcast in areas in which it believes it can provide invaluable programming. It is quite unfortunate that several mutually-exclusive applicants of BFTC have, in an otherwise laudable effort to zealously lobby the merits of their applications viz-a-viz those of BFTC, unfortunately crossed the line and attempted to impugn the reputation and malign the goals of BFTC. While BFTC recognizes that parties may feel strongly about the merits of their efforts, that is no justification whatsoever for engaging in

unseemly, vitriolic and unprovoked campaigns of misinformation.² The fact that BFTC has chosen to take the high road and remain above the mudslinging should not in any way be deemed a lack of resolve on its part to move forward in its effort to provide an array of locally and nationally produced programming designed to facilitate learning, and general information access, to disadvantaged and/or challenged adults and children. It is simply a recognition that lowering oneself to the level of zealots can only reflect badly on BFTC.

7. As William E. Kennard, Chairman of the Federal Communications Commission recently noted in his October 14, 1999 White House Briefing Speech as part of "Disability Awareness Month":

.... Fifty-four million Americans have a disability of some kind. This is the largest and most diverse minority group in the country, a massive American community whose members reside in every neighborhood in every town and city across the U.S. They live in the remote corners of Alaska and on sparsely-settled islands in Hawaii; they live on small farms and in big cities, hailing from every racial and ethnic background imaginable.

² For example, BFTC has had several frustrated competing applicants file petitions to deny or other similar strike filings when BFTC was unwilling to dismiss its application in question (i.e., because BFTC insisted that any settlement must result in BFTC being the permittee of the station or having the right to acquire the station in the event it was ever sold). It is truly ironic that the righteous zealots attacking BFTC argue (quite falsely) that BFTC has abused the Commission's processes by insisting on being awarded the construction permits in question. Isn't that the point? Aren't applicants supposed to be committed to building and operating the stations? **BFTC hasn't once initiated any settlement discussions. Any settlement discussions have always been the result of overtures from other parties** (and, even then, it has been in a fraction of the cases overall). Again, the irony of being attacked for wanting too much to be the FCC permittee of the stations in question is not lost on BFTC.

.... [w]e must embrace a culture of change. We must recognize that our work in this area is never done. As this dynamic industry changes, we must change with it. The accessibility movement must keep up with the pace of change.

.... They are the ones on the front-lines of the disability struggle, twenty-first century visionaries who prying open the doors of opportunity, knocking down the barriers that for too long have hindered people in this country.

8. BFTC agrees that it is critically important that this huge (and largely ignored) segment of society be given a voice. Since BFTC has chosen (unlike some of its fellow applicants and their misguided representatives) to be respectful of the Commission's ex parte rules, its procedural rules and its rules generally (e.g., with respect to issues such as strike applications, candor in statements to the Commission, etc.), the Commission is largely unaware of the intense groundswell of support which BFTC has experienced for the programming and community outreach it intends to provide. At the risk of being repetitive, BFTC's has, to its "lobbying" detriment, chosen to await the proper and procedurally proper time to demonstrate to the Commission the positive nature of its proposals. BFTC respectfully submits that a time period during which a processing "freeze" is in place is not such an appropriate time.

9. In sum, the Commission can rest assured that its fears of "speculation" referenced in its Report and Order have no relevance inasmuch as BFTC is concerned. BFTC is financially, legally and ethically committed to constructing each and every station for which it has applied. Ten years from now, the Commission will be able to look back and be proud of the broadcast efforts BFTC made in establishing its locally-

focused national network. It will be interesting to see how many other vocal but short-sighted organizations are even around to make any claim whatsoever.

C. Thematic Flaws in the Report and Order

10. As an initial statement of fact, BFTC truly empathizes with the Commission regarding the predicament that it faces. The long pendency of the processing freeze only underscores how difficult it has been, and remains to be, to fashion objective but efficient criteria for ensuring that diverse and responsive noncommercial service is expeditiously established in areas which so desperately need it. Unfortunately, the commenters referenced in the Report and Order, supra, naturally proposed criteria which would result in a favorable comparative review (e.g., American Family's "first to file" proposal). Obviously, BFTC would like rules in place which would guarantee that it receive all the construction permits for which it has applied. The fact is that the Commission is in the unenviable position of crafting rules which are guaranteed to do only one thing – generate controversy. While BFTC can empathize with the Commission's predicament, it must nonetheless respectfully challenge the bare assertions and unsupported conclusions reached in its Report and Order. By making qualitative judgments as to what is to be preferred with respect to NCE ownership and programming, without any empirical back-up, the Commission has promulgated a set of rules bereft of consistency and legally unsupportable. In short, lacking the existence of any preferences which can survive constitutional challenge, the Commission has generated a general statement of weak preferences and accorded them varying

degrees of weight for which no sustainable rationale is supplied. For reasons discussed in more detail hereinbelow, the tenuous threads by which the promulgated standards hang hardly represent a meaningful basis for award of such a precious right. In a noble effort to clear the backlog of pending cases, the Commission has made some factual assumptions which have unfortunately resulted in improper conclusions.

The simple themes running through the Commission's Report and Order are as follows:

- An organization, simply by virtue of its location in a particular area, will provide more diversity of viewpoints and programming than one located outside of the subject area.
- An organization with the fewest broadcast interests will provide more diversity of viewpoints and programming than one which has more broadcast interests.
- An organization based outside of a station's service area will establish a station but will ignore the needs and concerns of the station's listeners.
- Local origination of programming is of no meaningful significance.

D. Rejection of Lotteries

11. In initiating the subject inquiry which resulted in the above-referenced Report and Order, the Commission recognized that its previous process for awarding noncommercial broadcast construction permits was wholly inadequate. The Commission's Review Board described the NCE hearing criteria as "vague" and "meaningless", and indicated that it was often difficult to make a rational choice in noncommercial licensing cases. Real Life Educational Foundation of Baton Rouge,

Inc., 6 FCC Rcd 2577, 2580, n.8 (Rev. Bd. 1991). In its Report and Order, the Commission rejected the use of comparative hearings and lotteries in favor of a "point system". The Commission's adoption of a "point system" is, by its own admission, a streamlined "form of comparative hearing". See Paragraph 3 of the Report and Order.

12. In adopting the point system, the Commission explicitly rejected the use of lotteries in awarding noncommercial broadcast construction permits. Its summary rejection of lotteries is curious given the complete lack of justification therefor. The Commission notes three concerns raised by commenters in support of its position but then glosses over the fact that the same concerns exist with respect to a point system. Specifically, the Commission cited three concerns raised by commenters:

1. Speculation.
2. Failure to select the best applicant
3. The potential for judicial challenge and delay.

As discussed hereinabove, BFTC can only speak for itself when it states that it views the current backlog of pending noncommercial applications as mainly a function of (a) the current processing freeze with respect to mutually-exclusive applications and (b) the increasing scarcity of (and thus increased interest in) available broadcast spectrum. While there may be instances where isolated groups have submitted speculative applications, BFTC does not share the view of other commenters that the existence of multiple filings for communities across the country is part of a grand conspiracy to traffic in construction permits. This is the noncommercial band, mind you. It is assumed that any entity to which the Commission grants a construction permit is

legally qualified to be a noncommercial permittee. Even assuming arguendo that a party was willing to incur substantial legal and engineering expense hoping to prevail in an undetermined number of proceedings, do the commenting parties truly believe that the potential financial gains outweigh the upfront costs? BFTC would respectfully submit that is not the case. Even if "speculation" is a true concern and not some red herring put forth by entities which believe a "first to file", "race to the courthouse" strategy accords some special rights to certain entities and renders all other officious interlopers, the Commission can easily deal with the issue by strengthening its anti-trafficking rules. In fact, the Commission's Report and Order specifically deals with the holding period requirements for granted construction periods. For what it is worth, BFTC supports even longer holding periods (i.e., eight years to mirror a complete license term) in order to discourage speculation.

13. In short, the Commission has adequately addressed the concern about "speculation" in mandating a four year holding period. In rejecting lotteries, the Commission provided no empirical basis for a presumption that lotteries would foster increased speculation viz-a-viz the use of a point system.

14. With respect to the concern that lotteries might result in the grant of construction permits to unqualified individuals, the Commission's Report and Order proffers absolutely no basis whatsoever for such a conclusion. If the Commission believes that its current or proposed processes do not protect against the potential grant of construction permits to unqualified permittees, BFTC respectfully requests that a threshold inquiry should be part of the licensing process. Specifically, BFTC believes

that the Commission should institute a "pre-approval" review process whereby the Commission would provide groups the opportunity (i.e., in response to "B" cutoff-like Public Notice) to challenge the qualifications of a proposed Commission permittee (i.e., with other more application-specific issues such as technical worthiness to be subject to the more traditional post-grant Petition to Deny cutoffs). While the Commission may be loathe to engage in this modified comparative hearing review, BFTC respectfully submits that this would be far preferable to the current process which encourages patchwork attacks of innuendo and misinformation.

15. Assuming that the Commission is only going to grant construction permits to qualified entities, the only possible basis commenters have for disfavoring lotteries cannot be the weighting (i.e., since a point system does the same thing) but rather that a qualified but "statistically inferior" applicant could win a lottery over a more highly weighted applicant. This is true. However, there has been absolutely no showing that one qualified applicant will in actuality be better than another qualified applicant. By the very fact that only one applicant can receive a subject construction permit, any prediction that one applicant would ultimately be "better" in practice than another is simply pure speculation and not subject to objective verification. As with other things in life, sometimes what you expect is not often what you get.

16. Finally, the stated concern that the statutory weightings which would be employed in a lottery system would "almost certainly become the subject of lengthy constitutional litigation, which would jeopardize the major benefit of lotteries: speed" is confusing at best. BFTC respectfully submits that the length and nature of the subject

proceeding is going to be the same, whether, the "preferences" are called "weightings" or "points".

17. When all is said and done, the best the Commission can hope for is that it compiles a pool of qualified applicants, weighs them according to whatever constitutionally defensible criteria (i.e., if any) can be made and awards the construction permit(s). The Commission's rules provide ample legal leverage for dealing with licensees and permittees who fail to follow their public service mandate. Prior to employing auctions, the Commission had previously used a weighted lottery to award LPTV stations. If it was legally justified then, BFTC respectfully submits that no cogent argument has been made why such a process is not legally justified, and in the public interest, now.

E. The Commission's Point System

18. The Commission's attempts to distance the findings promulgated in the Report and Order from the concerns raised in FCC v. Bechtel, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II") only serve to highlight why Bechtel II represents guiding legal precedent. Specifically, in Bechtel II, a federal court held that the core integration criterion used to evaluate non-reserved applications, was "arbitrary and capricious, and therefore unlawful". FCC v. Bechtel, 10 F.3d 875, 878 (D.C. Cir. 1993). The Commission goes to great lengths to attempt to distinguish commercial broadcasting from noncommercial broadcasting. However, the simple fact is that if a preference, any preference, is legally and factually unsupportable, it is thus "arbitrary and capricious,

and therefore unlawful". In the case at hand, the Commission has fashioned a point system with one simple goal in mind, i.e., to ensure that the licensing process discriminates against a certain class of applicants in favor of another. Succinctly stated, the Commission has made a determination that a locally based group is to be preferred over all other groups, irrespective of any whether the group discriminated against would become "local" once it built the station in question, would provide more locally produced programming, would have significant ties to the community (e.g., in the form of local advisory boards or community outreach programs), would hire local individuals or generally, would provide a superior level of service to the community in question. The Commission's rules as currently proposed would directly penalize a group such as BFTC. Obviously, if BFTC establishes a local station, it is critical to its success that the local community accept the station, that the station be responsive to the community's needs and that the citizenry be involved in its operation. In short, the very same thing that a "local" station would need to do. The Commission in its Report and Order has provided absolutely no empirical basis for its contention that a station which commences broadcasting with "local" board members (versus, for example an advisory board) will by definition supply superior public service as compared to a station which is established in a community by "non-locals" (but with, for example, significant ties to the community). The fact that BFTC intends to provide programming which addresses what it considers to be both national and local issues should not mean that it should be effectively disqualified from comparative consideration, purely on the basis of its lack of a local address prior to construction the station. BFTC may be biased [and recognizes

the Commission's reticence to promulgate rules which even tangentially impact religious organizations in light of Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344; petition for rehearing denied, 154 F.3d 487; petition for rehearing en banc denied, 154 F.3d 494 (D.C. Cir.1998)] but BFTC fails to see how a fringe church or other secular group generally, simply because it ostensibly maintains a local address, can be deemed to be the preferred guardian of local diversity. BFTC respectfully suggests that giving a voice to a silent but nonetheless needy segment of society over a "vocal and local" fringe group will more realistically result in tangible benefits to a community.

19. Going from the general to the more concrete, the Commission's inability to empirically justify preferring a chosen class of applicants over others is highlighted in even clearer detail in its quantification of the points to be awarded under its new system. The only consistency to the Commission's point system is that it effectively guarantees groups with local addresses will prevail over any other group. Assuming (a) that the vast majority of applications will be decided on a non-technical basis (particularly since 307(b) is a threshold analysis) and (b) that, similarly, the overwhelming majority of comparative situations will not involve applicants seeking another station which directly overlaps an existing co-owned facility, no national (or for that fact statewide) entity can realistically prevail in a comparative situation.

20. It is clear from the Commission's Report and Order that it wants locally-addressed groups (even though national or statewide groups will be based in the community once the station is constructed) to be awarded noncommercial construction permits, even though there isn't any credible empirical evidence to indicate that such a

conclusion is factually defensible, let alone constitutionally proper. The "points" for each category bear no rational relation to any factual underpinning. Why three points for "established local entity" as opposed to two or one?

21. The fact that BFTC will be entitled to a number of the credits set forth by the Commission does not alter the fact that point system is patently indefensible. For example, the Commission at Paragraph 33 of its Report and Order states "[w]e have long considered diversity of local ownership a critical consideration because it enables the public to receive information reflecting a variety of viewpoints from different sources". In so stating, the Commission fails to note that "local ownership" does not mean "locally-addressed".³ In a curious attempt to demonstrate its commitment to local ownership diversity, the Commission strangely refers to the relaxed ownership provisions of the Telecommunications Act of 1996. Given the fact that two non-local broadcast groups can control over 70% of the revenues in a broadcast market, BFTC respectfully submits that the Commission would be hard pressed to find anyone other than Clear Channel Communications or other similar broadcasting behemoth who would argue that broadcast consolidation has resulted in "local diversity".

22. At the risk of belaboring the obvious, the specific "points" to be awarded are as legally and factually unjustifiable as the categories themselves.

³ The Commission, in its extensive discussion of the 1967 Carnegie Commission Report (see Paragraphs 44 and 45 of the Report and Order), similarly failed to note that the term "local station" was not meant to mean exclude stations which were built initially by "non-local" parties but which, after construction, became significant "local stations".

F. Miscellaneous

23. Whether or not the Commission on reconsideration reinstates lotteries or fine-tunes its point system to make it legally and constitutionally defensible, it is imperative that the criteria pursuant to which the award of noncommercial permits be fair and nondiscriminatory. If the Commission truly believes that an inexperienced local group will provide better service to a community than a more experienced national group (which, again will ultimately have a substantial local presence), then it is imperative that it engage in more than a generalized exercise in "gut feelings". Given the Commission's resources, it is not much of an imposition to complete some basic empirical research.⁴ Simply because the fashioning of new rules is difficult does not justify the imposition of processing rules with no substantive factual back-up.

24. In rejecting the award of a preference for broadcast experience, the Commission stated that "[w]e do not believe that a case has been made for always favoring one over the other as a general practice in NCE broadcasting". Yet that is exactly what the Commission's new point system would do, with no justification as to why. In probably the most telling demonstration of the inherent logical inconsistencies in the Commission's Report and Order, the Commission rejected a call for a preference to be awarded based upon locally-originated programming, despite the fact that its proposed award of an "established local entity credit" is premised on the assumption

⁴ At Paragraph 62 of the Report and Order, the Commission indicated that it intended to continue to conduct "necessary fact-finding studies" to address the minority-based credits. If that is accurate, why wouldn't it similarly engage in the same level of "fact-finding" to support any conclusions reached in this proceeding?

that local owners will produce responsive local programming. As Commissioner Tristani noted in her Dissent to the Report and Order:

... I would have given an additional boost to stations that promised to provide a minimum level of locally-originated programming. Local-origination programming is one of the foundations on which the noncommercial educational service was built.

.... In sum, awarding additional points for local-origination programming would: (1) promote the purpose of the noncommercial educational service; (2) advance Congress' goal of preserving local origination programming; and (3) pass muster in court. The majority's argument against adoption is specious.

25. In another curious facet of its Report and Order, the Commission proposes to attribute (for tie-breaking purposes) the broadcast interests of an applicant in comparing competing applications. As with other portions of the Report and Order, the Commission fails to answer once key question: Why? What possible benefit will be derived from virtually ensuring that the most experienced and qualified individuals will be precluded from bringing their expertise to a local noncommercial station. In the case of BFTC, what possible relevance is there to the fact that BFTC's founder, Dr. Flinn, owns other stations which program wholly unrelated, commercial matter? What possible basis would the Commission have for seeking to prevent a philanthropic individual from using his expertise to improve broadcasting within a community? Even assuming the Commission believes such a tie-breaking demerit is warranted, there is absolutely no basis whatsoever for attributing the ownership interests of an applicant which do not overlap the proposed station in question. Likewise, the Commission's decision to penalize (in a tie-breaker) an entity simply because of the number of its pending applications is absurd. The more interest a party shows in establishing

noncommercial stations, the more it should be penalized? Any "tie-breaking" should be done by lottery, since obviously the differences between the parties leading up to that point would have been minuscule at best.

G. Conclusion

26. The Commission's point system as currently constituted is factually unsupported and unconstitutionally results in the unequal treatment of a distinct class of applicants. Specifically, in a thinly-veiled effort to award noncommercial construction permits to locally-addressed applicants, the Commission has unfortunately trampled upon the rights of other equally deserving (if not more deserving) applicants. In its laudable desire to craft rules to clear the pending application backlog, the Commission has unfortunately forged criteria with no practical substance. As more and more "preferences" have been struck down by appellate authorities, the Commission has been forced to rally around less and less relevant legal bases for awarding construction permits. If the Commission insists on focusing on "pre-application" local residence as a dispositive factor in awarding construction permits, BFTC respectfully submits that equivalent "local" credit should be afforded to applicants which intend to (a) establish local advisory boards, (b) employ local individuals (e.g, 80% of the station's staff), (c) train local interns or students, (d) provide locally-produced programming (e.g., at least 50%) or (e) provide programming which targets a specific and identifiable segment of the local population (e.g., in the case of BFTC, emotionally and physically challenged individuals). National groups which establish local presences bring many positive

attributes to the table, not least of which are solid financial bases, greater national and local outreach potential and a broader understanding of issues affecting many ethnic and demographic groups which may not statistically be considered a force in a particular community. Much like the Commission brings a broader federal perspective to regulating issues which are national in scope (even though such regulation is often at the expense of states' rights), "non-local" national broadcasters bring a general perspective which is in the public interest of a local community. Until the Commission can conclusively demonstrate otherwise, preferring one applicant over another in the award of such a precious right based on one tenuous (and factually unsupported) criterion is short-sighted and constitutionally suspect. As the United States Court of Appeals for the DC Circuit noted in striking down a similar attempt by the Commission to establish a factually unsupported preference (i.e., a "female" preference):⁵

Contrary to the Commission's apparent supposition, however, a mandate to serve the public interest is not a license to conduct experiments in social engineering conceived seemingly by whim and rationalized by conclusory dicta. Were we to hold otherwise, we would be conceding that by simply identifying as statistically underrepresented a discrete social group, the Commission could grant members of that group preferential treatment in the name of diversity of programming. The question then would become not whether the Commission should have a special program for women, but why it should not also have one for the aged, the handicapped, labor unions, community organizations, and other "underrepresented" groups. To read the public interest mandate so broadly would in effect confer on the Commission the unbounded discretion that the courts have repeatedly held it does not possess. As the Supreme Court has stated, the criterion of the "public interest, convenience or necessity," while giving the Commission wide discretion, "is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." See National

⁵ Steele v. FCC, 770 F.2d 1192 [58 RR 2d 1463] (DC Cir), *vacated*, Steele v. FCC, No. 84-1176 (DC Cir. Oct 31, 1985) (en banc).

Broadcasting Co. v. United States, 319 U.S. 190, 216, 87 L. Ed. 1344, 63 S. Ct. 997 (1943); see also FCC v. RCA Communications, Inc., 346 U.S. 86, 90, 73 S. Ct. 998, 97 L. Ed. 1470 (1953).

Wherefore, based on the foregoing, it is respectfully requested that the subject
Petition for Reconsideration be granted.

Respectfully submitted,

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